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OCT 17 2023

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NETLIST INC., a Delaware corporation, Plaintiff-Appellee, v. SAMSUNG ELECTRONICS CO., LTD., a Korean corporation, Defendant-Appellant.	No. 22-55209 D.C. No. 8:20-cv-00993-MCS-ADS MEMORANDUM*

NETLIST INC., a Delaware corporation, Plaintiff-Appellant, v. SAMSUNG ELECTRONICS CO., LTD., a Korean corporation, Defendant-Appellee.	No. 22-55247 D.C. No. 8:20-cv-00993-MCS-ADS

Appeal from the United States District Court
for the Central District of California
Mark C. Scarsi, District Judge, Presiding

Argued and Submitted June 8, 2023
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: M. SMITH and DESAI, Circuit Judges, and AMON,** District Judge.
Partial Dissent by Judge DESAI.

This appeal arises from a contract dispute between Samsung Electronics Co., Ltd. and Netlist Inc. Samsung appeals the district court's (1) grant of partial summary judgment in favor of Netlist on Netlist's breach of contract claims, (2) award of nominal damages, (3) grant of a declaratory judgment that Netlist properly terminated the contract, and (4) preclusion of Samsung's affirmative defenses at trial. Netlist cross appeals the district court's preclusion of certain fees pursuant to the contract's consequential-damages bar. We assume the parties' familiarity with the briefing and record. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse and remand in part.

1. The district court erred in granting Netlist summary judgment on its claim that Samsung violated § 6.2 of the Joint Development and License Agreement ("JDLA"), because the provision is ambiguous as to whether Samsung's supply obligation is limited to the now-failed joint development project (the "JDP") or applies more broadly to the parties' overall business relationship. *See L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020) (grant of summary judgment reviewed de novo). Section 6.2 requires Samsung to "supply NAND and

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** The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

DRAM products to Netlist on Netlist's request at a competitive price." The substantive law of New York governs this dispute. To assess contract ambiguity, we consider "the intention of the parties . . . [as] gathered from the four corners of the instrument." *Beal Sav. Bank v. Sommer*, 865 N.E.2d 1210, 1213 (N.Y. 2007). And in determining the parties' intent as to a particular provision, New York courts read "the entirety of the agreement in the context of the parties' relationship and circumstances," rather than isolating distinct provisions of the agreement. *In re Riconda*, 688 N.E.2d 248, 252 (N.Y. 1997).

Standing alone, the plain language of § 6.2 favors Netlist's interpretation: that Samsung must fulfill all NAND and DRAM orders by Netlist for whatever purpose. *See Vt. Teddy Bear Co. v. 538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004) ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." (citation omitted)). Read as an integrated whole, however, the contract's apparent purpose as derived from its title, structure, and related provisions make § 6.2 "reasonably susceptible of more than one interpretation." *See Chimart Assocs. v. Paul*, 489 N.E.2d 231, 233 (N.Y. 1986).

First, the JDLA has two stated purposes: (1) developing a new NVDIMM-P product (*i.e.*, the JDP), and (2) patent cross-licensing. The title and preamble of the agreement exclusively reference these two topics, and each substantive section

corresponds entirely to one of the two goals. In this context, it is reasonable to interpret § 6.2 as tethered to one of those projects rather than as a separate, freestanding obligation. *See Hooper Assocs., Ltd. v. AGS Comps., Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989) ("Words in a contract are to be construed to achieve the apparent purpose of the parties.").

Second, the title and structure of § 6 support a finding of ambiguity. Section 6, "Supply of Components," requires both parties to supply certain products to the other upon request. Section 6.1 requires Netlist to "provide Samsung any NVDIMM-P controller," while § 6.2 requires Samsung to "supply NAND and DRAM products." Netlist's view is that because § 6.1 explicitly links Netlist's supply obligation to the JDP, while § 6.2 does not, that omission must be viewed as intentional. That is one plausible reading. It would also be reasonable to read §§ 6.1 and 6.2 as complementary mirror provisions that describe the parties' obligations to provide components of the NVDIMM-P product. *See N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) ("The *expressio unius* canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded." (internal quotation marks and alteration omitted)).

Third, if Netlist's interpretation of § 6.2 is correct, then the provision would be a significant outlier in the overall agreement. As noted, all other substantive provisions of the JDLA concern either the JDP or cross-licensing and describe the

parties' rights and obligations related to those elements in detail. But if § 6.2 is properly understood as an unbounded supply obligation, it would represent a separate, third element of the JDLA. In addition, it would be unusual for this purportedly important, discrete obligation to be referenced only once in a single sentence in the entire agreement. Accordingly, we conclude that § 6.2 could reasonably be understood as restricted to the NVDIMM-P project.[1] *See Hooper*, 548 N.E.2d at 905 ("Although the words might seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view." (internal quotation marks and citation omitted)).

Because we conclude that § 6.2 is ambiguous as a matter of law, we remand to the district court to consider in the first instance whether the extrinsic evidence "creates a genuine issue of material fact" as to the provision's meaning. *See MacIntyre v. Carroll Coll.*, 48 F.4th 950, 956 (9th Cir. 2022) ("[T]he remaining issues are not purely legal and require us to determine whether the evidence creates a genuine issue of material fact. The district court is thus better suited to consider these issues in the first instance.").

2. The district court erred in granting Netlist judgment on its claim that

[1] To the extent Samsung contends that the district court independently erred by awarding nominal damages following the jury's finding that Netlist had not suffered actual damages from the breach of § 6.2, we disagree. *See Kronos, Inc. v. AVX Corp.*, 612 N.E.2d 289, 292 (N.Y. 1993).

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